No. 79-700

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

WALTER FLEISHER CO., INC.,

Petitioner,

vs.

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

Respondents.

RESPONDENTS' BRIEF

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ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

BRIEF FOR THE RESPONDENTS

QUESTIONS PRESENTED FOR REVIEW

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1. Whether a state statute which concurrently affects both foreign and interstate commerce is violative of the Commerce Clause

in that:

a. The statute discriminates against interstate commerce and in favor of foreign commerce or,

b. the statute intrudes into the field of foreign commerce which is exclusively regulated by Congress.

2. Whether a political subdivision of a state may raise the constitutionality of a state statute in defending a lawsuit challenging the action taken by its officials.

SUMMARY OF ARGUMENT

1. A state statute which does not accord the tax benefits to interstate commerce which are accorded to foreign commerce imposes a discriminatory tax burden upon interstate commerce in violation of the Commerce Clause.

2. If alternative, nondiscriminatory means are available to achieve a local economic purpose, a statute which discriminates against interstate commerce will be struck down under the Commerce Clause.

3. A state statute which accords foreign commerce tax benefits while withholding such benefits from interstate commerce, creates an impermissible burden on interstate commerce prohibited by the Commerce Clause.

4. Congress has exclusive and plenary control over foreign commerce to the complete exclusion of the states.

5. A state statute which encourages foreign commerce by offering tax inducements to foreign businesses prevents the nation from speaking with one voice in the area of foreign trade.

6. Article III jurisdiction is conferred on this Court when a complainant (Petitioner) alleges injury in fact and that he is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

7. Political subdivisions are not required to satisfy traditional Article III standing requirements when they are defendants in a state court proceeding which challenges the acts of its officials in denying a tax exemption and refund.

8. By finding Respondents have prudential standing in this case, the Court will encourage public entities to protect the constitutional rights of its citizens while at the same time allow them to avoid otherwise automatic and potentially crippling damage awards.

ARGUMENT

I

A STATE STATUTE CANNOT FAVOR OR ENCOURAGE FOREIGN COMMERCE AT AT THE EXPENSE OF INTERSTATE COMMERCE

In this issue of first impression, the Court is called upon to decide whether a state taxing statute which concurrently affects both foreign and interstate commerce is violative of the Commerce Clause (Article I, §8, cl 3) because it accords foreign goods economic benefits not available to interstate goods. A collateral issue is whether the statute impermissibly intrudes into the area of foreign commerce which is exclusively regulated by Congress.

A. ANALYSIS UNDER THE COMMERCE CLAUSE

Regulation Of Interstate Commerce

In recent years, this Court has fashioned a fourfold test under which state statutes are to

be scrutinized when challenged under the Commerce Clause. In Complete Auto Transit v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L. Ed. 2d 326 (1977), this Court rejected the "per se unconstitutional" rule in dealing with a privilege-of-doing-business tax. In its stead, this Court will now look, not to the formal language of a tax statute, but rather to its practical effect and will sustain a tax against Commerce Clause challenge:

> "When the tax is applied to an activity with a substantial nexus with the taxing state, is apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state." Complete Auto Transit v. Brady, supra, 430 U.S. 274, 279 (emphasis added)

A further refinement to this test was fashioned in 1979 in a situation dealing with an Oklahoma statute which prohibited the transportation or shipping out of the state minnows procured within the state's waters. Hughes v. State of Oklahoma, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). In discussing the discrimination aspect of the Complete Auto Transport test this Court said:

> "Under the general rule we must inquire (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates

against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." Hughes, supra at 336.

And if such facial discrimination is found to exist, it by itself may be a fatal defect of the statute:

> "[R]egardless of the State's purpose, because 'the evil of protectionism can reside in legislative means as well as legislative ends' [Philadelphia v. New Jersey 437 U.S. 617, 626, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978)], at a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." Hughes, supra at 337. [emphasis added]

In footnote 17 of the Hughes opinion (441 U.S. 337), a passage from Philadelphia v. New Jersey was cited which, as Respondents will show infra, is germane to this appeal:

> "[W]hatever [a state's] ultimate purpose, it may not be accomplished

by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently." Philadelphia v. New Jersey, 437 U.S. at 626-627.

Thus, when analyzing a state taxing statute which affects interstate commerce, a court's first inquiry is along the lines set forth in Complete Auto Transport v. Brady, supra, 430 U.S. 274, 279. If discrimination against interstate commerce is apparent from the face of the statute, it may fall regardless of the purpose of the statute or the effect. Philadelphia v. New Jersey, supra, 437 U.S. 617, 626-627. In any event, if discrimination is found, the statute will be strictly scrutinized and will fall if there are alternative nondiscriminating means of achieving the desired goals. Hughes v. Oklahoma, supra, 441 U.S. 322, 337.

Regulation of Foreign Commerce

When analyzing a state statute which affects foreign commerce, the above series of inquiries must be made, but in addition, the court must look to see if the statute risks multiple taxation of the goods and whether the statute prevents the Federal government from exercising complete control over foreign commerce. Japan Lines, Ltd. v. County of Los Angeles, 441 U.S. 434, 446, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979).

The basis for the multiple taxation aspect is that neither the Supreme Court nor the Nation can ensure full apportionment of taxes when one of the taxing entities is a foreign sovereign (Japan Lines, supra, 441 U.S. 447). The federal sovereign aspect is dictated by the need to have federal uniformity in areas where such uniformity is necessary. Id. at 448. "In international relations and with respect to foreign intercourse and trade, the people of the United States act through a single government with unified and adequate national power." Board of Trustees of University of Illinois v. United States, 289 U.S. 48, 59, 53 S.Ct. 509, 77 L.Ed. 1025 (1933).

While this Court has noted that Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty, "[i]t has never been suggested that Congress' power to regulate foreign commerce could be so limited" Japan Lines, Ltd., supra at note 13 with cases cited.

Consistently, the Court has recognized the exclusive and plenary aspect of Congress' power to regulate foreign commerce:

> "It is essential attributes of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action [Citations]... The Congress may determine what articles may be imported into this

country and the terms upon which importation is permitted... If the Congress saw fit to lay an embargo or to prohibit altogether the importation of specified articles, as the Congress may [Citations], no state by virtue of any interest of its own would be entitled to override the restriction. The principal of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce." Board of Trustees of University of Illinois v. United States, 289 U.S. 48, 56-57, 53 S.Ct. 509, 510, 77 L. Ed. 1025 (1933).

And in Hines v. Davidowitz, 312 U.S. 52, 63, 61 S.Ct. 399, 89 L.Ed. 581(1941), this Court stated:

"Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."

And directly in point to the Solicitor General's position as amicus in our companion case Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1979, No. 78-1577, is Justice Stewart's concurring opinion in Zschernig v. Miller, 389 U.S. 429, 443, 88 S.Ct. 664,

19 L.Ed.2d 683 (1968):

> "The Solicitor General, as amicus curiae, says that the Government does not 'contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations.' But that is not the point. We deal here with the basic allocation of power between the states and the nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several states."

When judging a state statute against Commerce Clause restrictions, a strict scrutiny test is required whenever the statute bespeaks of discrimination. It will not be per-se unconstitutional, but a compelling state interest must be shown to justify it and there must not be alternative means of achieving that interest which do not discriminate. Yet when the field of foreign commerce is involved, no state statute will survive scrutiny by this Court, regardless of its purpose, if it impairs the Nation's ability

to speak with one voice.

As shown in the following sections, §225 of California's Revenue & Taxation Code discriminates on its face against interstate commerce and seeks to regulate foreign commerce in a manner contrary to the National interest.

B. THE CALIFORNIA STATUTE

Section 225 of California's Revenue and Taxation Code states:

> §225. "Personal Property manufactured or produced, (1) outside this state and brought into this state for transshipment out of the United States, or (2) outside of the United States and brought into this state for transshipment out of this state, for sale in the ordinary course of trade or business shall be exempt from taxation. The exemption under this section shall not apply to personal property in manufacturing process or production. Such process or production shall not include the breaking in bulk, labeling, packaging, relabeling, or repackaging of such property."

Breaking the statute down into its component parts indicates it applies to the import and export of goods manufactured or produced

outside of California. An exemption from California's ad valorem property tax is given such goods so long as they are not in manufacturing process or production within the state.

The discrimination readily apparent on the face of the statute lies within subsection (1) where the exemption is conditioned upon "transshipment out of the United States." Thus, interstate commerce coming into California is taxed unless it is further shipped out of the Country. Further shipment within the United States does not satisfy the condition. Foreign commerce, on the other hand, is entitled to the exemption if it is shipped elsewhere in the Nation. Thus an unequal tax burden is placed on interstate commerce.

The attempt to regulate foreign commerce is also apparent from the statute. An exemption from California's uniform ad valorem tax is granted to property manufactured or produced "outside of the United States." This is a direct attempt to encourage foreign business to come to California by offering economic inducements in the form of a rebate of the tariffs paid on such goods to the United States. Whether this statute significantly affects foreign commerce or not, it unquestionably affects it to some degree and is a regulation of foreign commerce prohibited by Article I Section 8 cl. 3 of the Constitution.

C. THE INVALIDITY OF THE STATUTE

Applying the current state of the law to Section 225 leads to the inescapable conclusion that the California Court of Appeals was correct in finding it unconstitutional under the Commerce Clause.

On its face, Section 225 discriminates against interstate commerce. Interstate commerce is afforded an exemption from California's ad valorem tax only if goods are exported from the Country. Foreign goods, however, are automatically exempted. Thus, novelty items brought from Japan to Los Angeles to be sent to Chicago are exempt from taxation. The same novelty items brought from Hawaii (conceivably in the same ship) to Los Angeles to be sent to Chicago (on the same truck) are not exempt from taxation and are taxed. This unequal tax treatment is discrimination.

Thus, the statute does not automatically pass the four pronged test of Complete Auto Transit, supra, 430 U.S. 274. Under Hughes v. Oklahoma, supra, 441 U.S. 322 and Philadelphia v. New Jersey, supra, 437 U.S. 617 further scrutiny of this discrimination is required. Philadelphia teaches that this discrimination may be fatal to the statute without any additional review "unless there is some reason apart from their origin, to treat [the interstate goods] differently." Id. at 626-627.

The Court of Appeal found the purpose of Section 225, as indicated by its legislative history, was to promote utilization of California ports and discourage removal of import business to states with a more favorable tax structure (Zee Toys, Inc. v. County of Los Angeles (1978) 85 Cal.App. 3d 763). This sole purpose was to foster and protect in-state businesses. An incentive was given to foreign companies to bring their goods through California ports for transshipment to the rest of the United States. The result of this local economic purpose was to impose upon interstate commerce an unequal tax burden in order to protect a domestic business (port trade). The discrimination resulting from this purpose is the evil warned of in Philadelphia v. New Jersey, supra, 437 U.S. 617. As the only reason for this discrimination is the origin of the interstate goods, Section 225 is fatally defective on its face and no review of the effect of the statute is necessary. A state's desire to avoid business flight to another state cannot be the basis for usurping Congress' commerce power. Boston Stock Exchange v. State Commission, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977).

Even if the per se discrimination does not overturn Section 225, Hughes v. Oklahoma, supra, 441 U.S. 322 sounds its death knell. No party can honestly contend that Section 225 does not discriminate against interstate commerce. The issue is whether such discrimination is unconstitutional. Hughes, supra, indicates that a discriminatory statute having a legitimate

local purpose must fall if "alternative means could promote this local purpose as well without discriminating against interstate commerce." Id. at 441 U.S. 336.

As previously pointed out to this Court, California has recognized the invalidity of Section 225 and has cured it by exempting all business inventories from taxation (Section 219 Revenue and Taxation Code, Stats. 1979, chap. 1150, §7). Such action clearly accomplishes the legitimate local purpose of encouraging foreign business to use California ports while not imposing any additional tax burden on interstate commerce. Short of exempting all inventories, the Legislature could have exempted all commerce coming from out of state to be further transshipped. That alternative also would have eliminated the discrimination against interstate commerce.

As feasible alternative means existed to accomplish the local purpose and as such means would not have discriminated against interstate commerce, Hughes v. Oklahoma, supra, 441 U.S. 322 requires the invalidation of Section 225 without further analysis.

The Court of Appeal, relying on Zee Toys v. County of Los Angeles, 85 Cal. App. 3d 763 (1978), found Section 225 unconstitutional as it discriminated against interstate commerce. Respondents contend this was proper in light of the Hughes and Philadelphia decisions. However, should this Court look beyond the discrimination to the burden placed on interstate commerce,

sufficient facts exist in the record to show the burden was not incidental or de minimus but in fact was substantial. As being a substantial burden, the statute must fall as being violative of the Commerce Clause.

The uncontroverted declarations of Arthur Lew (A-58), Joseph W. Grant (A-60) and James Dexter Clark (A-56) when taken together with the Stipulated Set of Facts (A-34) and Walter Fleisher's declaration (A-14) present this Court with the following evidence which was before the Court of Appeal.

A substantial amount of sea-borne and land traffic flows into California from other points within the United States and is distributed throughout various regions of the United States (A-58; Lew Declaration). Inventories of a nature similar to Petitioner's remain in California prior to being transshipped for 3-1/2 months (A-60; Grant Declaration). Petitioner reported imported business inventory at a single location on March 1, 1976 to be $287,694 of which 74.2% was further shipped out of California (A-14; Fleisher Declaration). Over 30 lawsuits involving the validity of Section 225 are seeking refunds of more than $1,000,000 against the County of Los Angeles (A-56; Clark Declaration).

From the above facts the burden Section 225 places on interstate commerce can be derived simply by looking at the benefit importers of foreign goods seek to obtain. Well over $1,000,000 in actual tax refunds is at stake in

30 cases (over $30,000 per plaintiff for the 1976 tax year). One plaintiff (Sears) stands to benefit by over $280,000 for a single year should Section 225 be found valid (judgment rendered in favor of Sears by Trial Court: Appendix in Sears, Roebuck v. County of Los Angeles, No. 78-1577). United States businesses (whose interstate commerce represents a substantial portion of the flow of traffic into California) will not share in this benefit.

Respondents contend no additional evidence is necessary to show the burden Section 225 places on interstate commerce. Obviously a Philadelphia or Hawaii businessman faces an unequal tax burden if he is to compete with the Japanese importers. This is exactly the situation the Commerce Clause prohibits--a discriminatory tax which produces a substantial burden on interstate commerce. As such, Section 225 should be struck down.

In addition to Section 225 being invalid as discriminating against interstate commerce, it is also unconstitutional as an attempt to enter into a field of exclusive federal control--the regulation of foreign commerce. As previously pointed out, Congress' power in this area is exclusive and plenary (Japan Lines, Ltd. v. County of Los Angeles, supra, 441 U.S. 434; Zschernig v. Miller, 398 U.S. 429; Board of Trustees of University of Illinois v. United States, 289 U.S. 48). There is no room for states to move in this field without interfering with Congress' power.

Section 225, on its face, is an attempt to influence foreign commerce. It grants an exemption from taxation to imported goods if foreign businesses use California ports. It does not give such exemption to inter or intra state goods. It represents a direct attempt by the State of California to regulate foreign commerce by offering incentives to come into this state as opposed to other states of the Union. A detailed analysis of the effect Section 225 has on foreign commerce vis a vis federal tariff regulation is contained in Respondents' Brief in the pending case of Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1978, No. 78-1577. Rather than repeat such arguments herein, Respondents merely will adopt them in support of their position in this case.

Respondents contend the foregin commerce clause is exclusive and plenary and does not allow any state action in the field. If Congress' power does not completely preempt the field, then the standard of review of state statutes impinging on foreign commerce must be the same as set forth in Complete Auto Transit v. Brady, 430 U.S. 274. And if such is the standard, then Japan Lines, Ltd. v. County of Los Angeles, 441 U.S. 434 was wrongly decided.

Respondents have attempted to refrain from duplicating the positions and arguments set forth in their Respondents' Brief in Sears, Roebuck v. County of Los Angeles, October Term, 1978, No. 78-1577. However, such arguments apply with equal force to this case and Respondents incorporate them into their positions set forth herein.

II

NO ISSUE OF STANDING IS PRESENTED BY THIS APPEAL

A. ARTICLE III JURISDICTION-STANDING REQUIREMENTS

During oral argument in Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1979, No. 78-1577, the issue of the County's standing to challenge the constitutionality of §225 was raised. The County contends that traditional standing requirements are not applicable to it in its status as Defendant/Respondent.

Current Article III standing requirements have been enunciated by the Court in a line of cases beginning with Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962) and Flast v. Cohen, 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968).

> "As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf'. Baker vs. Carr 369 U.S. 186, 204, 82 S.Ct.

691, 703, 7 L.Ed.2d 663 (1962)." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). [Emphasis original]

Standing is shown when the complainant alleges an injury in fact and that such injury was the consequence of the defendant's action, or that prospective relief will remove the harm. Warth v. Seldin, supra, 422 U.S. 490, 505; Data Processing v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970); Barlow v. Collins, 397 U.S. 159, 164, 90 S. Ct. 159, 163, 25 L.Ed.2d 192 (1970).

In refining this relationship a plaintiff must have to the defendant's action, this Court has developed a "zone of interest" approach.

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Data Processing v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) [Emphasis added]

In determining standing, it is not enough to simply show injury in fact. The plaintiff must also show he was protected by some statute

or Constitutional guarantee against this injury occuring.

This appeal satisfies all of the Article III standing requirements:

1. Petitioner has suffered an injury in fact - a tax was levied on its inventory, taxes were paid, and no refund of such tax has been made.

2. Petitioner's injury was directly caused by Respondent's action- the denial of the exemption provided by §225 and the refusal to refund the taxes.

3. Petitioner is within the zone of interests §225 attempts to protect.

4. A decision on the merits in this case will remove the harm - the Court will decide the County's action in denying the exemption provided by §225 was lawful in that the statute is unconstitutional.

In this case, both parties have sufficiently "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 205, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

Petitioner has a real and concrete interest in obtaining a refund of the taxes it has already paid. Respondent has an equally real and adverse interest in that pending lawsuits involving the issue presented herein seek to recover well in excess of $1,000,000.00 (Appendix A. p. 56).

B. TRADITIONAL ARTICLE III STANDING REQUIREMENTS DO NOT APPLY TO DEFENDANTS/RESPONDENTS

The cases cited by Petitioner for the proposition that the County cannot challenge the constitutionality of §225 are inapplicable to this appeal and are readily distinguishable.

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 53 S.Ct. 431, 77 L. Ed. 1015 (1933) involved a situation where the Mayor and City Council of Baltimore, and the Mayor, Counselor, and Aldermen of the City of Annapolis, municipal corporations, challenged the validity of a statute of Maryland exempting the property of a particular railroad from taxation. The railroad was in the hands of a receiver appointed by the Federal District Court. The municipal corporations brought suit in the Federal District Court against the receiver for taxes overdue.

On certiorari, this Court held the municipal corporations did not have the capacity to sue the State on Fourteenth Amendment grounds because:

> "A municipal corporation, created by a State for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." Williams v. Mayor and City Council of Baltimore, supra, 289 U.S. 36, 40. [Emphasis added]

The distinctions between that case and ours are obvious. Williams involved cities bringing suit as cities directly in Federal Court. Our case involves a County defending its action in State Court. The Williams plaintiffs (cities) had to meet federal jurisdictional requirements and were unable to do so. Respondents, being sued in State Courts, had no such obligation (nor did Petitioner below).

This Court decided Williams under the "privileges or immunities" clause of § 1 of the Fourteenth Amendment. Respondents query whether the result would be different under the due process or equal protection clauses in light of recent decisions of this Court. (Monell v. New York City Department of Social Services, 426 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); Owen v. City of Independence, Missouri, ___ U.S. ___, 100 S.Ct. 1398, 63 L.Ed. 2d 673 (1980).

Finally, the Court concluded Williams by noting that municipalities "will be heard to complain of a violation of the Constitution of the State. Their standing for that purpose, at least in the State Courts, is a question of State practice [citing cases] as to which the federal courts do not exercise an independent judgment." Williams, supra at 47, 48 [emphasis added]. The County had the statutory authority to sue and be sued in state court, and as the State did not limit this authority by prohibiting the County from raising the validity of a state statute as a defense to an action, no standing problem existed in tate ourt.

In City of New York v. Richardson, 473 F.2d 923 (1973) the City of New York and three individuals brought suit in the federal courts under the Fourteenth Amendment in an attack on federal and state social securities laws. The municipalities were dismissed out of the action based upon the Williams holding. Thus, Respondents' arguments to Williams apply to the City of New York case. But, again, it must be pointed out that the City of New York was a plaintiff trying to satisfy federal jurisdictional requirements in federal court. Neither of these cases require a defendant in state court to satisfy federal standing requirements.

When viewed against the backdrop of the case at bar, it becomes apparent that neither Williams nor City of New York precludes Respondents from raising the constitutionality of §225 in this appeal. The taxing agent for

Respondents is the Assessor. The Assessor has taken an oath to uphold the State and Federal Constitutions. He denied Petitioner's claim for exemption from taxation based on his belief that §225 violated provisions of both Constitutions. The Board of Supervisors of the County denied Petitioner's claim for refund of taxes. Unquestionably, the Assessor and the members of the Board of Supervisors would have standing before this Court to defend their actions (Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); City of New York v. Richardson, 473 F.2d 923, 933 (1973)). Unfortunately, they cannot be here; the County must stand in their place. California law requires that all litigation to recover taxes be brought against the public entities and not against the Assessor or members of the Board of Supervisors. (Revenue and Taxation Code §5140). Thus, the fact that the County of Los Angeles is the Respondent and not the Assessor is a State procedural matter and as long as federal question jurisdiction exists, this Court may decide the case.

Prudential reasons why this Court should exercise it jurisdiction are discussed infra. Respondents contend Article III jurisdiction exists, by virtue of Petitioner's standing to invoke it. Defendant standing has been the only issue raised by Petitioner. However, the remaining aspects of case or controversy jurisdiction are also satisfied by this appeal; to wit, this is not a collusive suit since Respondents have a $1,000,000 interest at stake, no political question is involved, and real adversorial

interests are present in that this case is not moot, hypothetical or speculative.

Whether a County should be allowed to raise the constitutionality of a State statute in defending an action may well be an issue of interest of this Court. However, it is an aspect of this Court's self-imposed policy on judicial restraint and not a constitutional requirement of Article III jurisdiction.

C. PRUDENTIAL CONCERNS DICTATE THIS CASE BE DECIDED ON ITS MERITS

Since Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), this Court has further refined its concept of "judicial restraint" or "prudential standing." Respondents are of the opinion the questions asked during oral argument in Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1979, No. 78-1577 reflect a concern by some of the justices over this issue and not over pure Article III standing problems.

Prudential limitations on the exercise of federal court jurisdiction have historically revolved around the status of the plaintiff. "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the courts remedial powers."

Warth v. Seldin, supra, 422 U.S. 490, 518. This is so because "without such limitations - closely related to Article III concerns but essentially matters of judicial self-governance - the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Id. at 500.

While Respondents contend these principles apply only to litigants seeking to invoke the Court's jurisdiction, if they are to be applied to a defendant, compelling reasons require a finding of prudential standing in the case. Governmental entities must be allowed to raise the unconstitutionality of a state statute as a defense to litigation brought against the entity based upon its failure to obey the statute.

Recently this Court held that municipalities are to be held strictly liable when its actions, through its officers, violate the constitutional rights of others (Owen v. City of Independence, Missouri, ___ U.S. ___, 100 S.Ct. 1398, 63 L.Ed. 2d 673 (1980). No good faith defense was allowed in the §1983[1/] action on behalf of the governmental entity.

It takes no stretch of the imagination to foresee a Civil Rights action being filed against

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1/ 42 USC § 1983.

the County by taxpayers or a domestic or interstate businessman who alleges injury by the granting of exemptions under §225.[2/] Standing could be shown under Data Processing v. Camp, supra, 397 U.S. 150 (1979). Damages for loss of profits, refund of taxes, unfair competition, etc., would be sought, and attorneys' fees could be awarded (42 USC §1988). If §225 were declared unconstitutional, as Respondents contend, the County would be automatically liable for an untold amount of damages under the Owen v. City of Independence ruling.

By allowing the County to argue against the validity of §225 in this action, the Court would be encouraging public entities to protect the constitutional rights of its citizens while at the same time allowing them to avoid otherwise automatic and potentially crippling damage awards.

A separate reason for this Court to find that prudential standing exists is that the County of Los Angeles has express statutory authority to institute and defend litigation. Government Code §23004 grants to the County the power to sue and be sued. No reservation of litigation against the State is mentioned. While a state cannot confer Article III jurisdiction upon this Court, specific statutory authority to sue is

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2/ City of New York v. Richardson, 473 F.2d 923, 933 Fn. 11 (1973); Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

persuasive when considering the "prudential standing" issue [Warth v. Seldin, supra, 422 U.S. 490, 509; United States v. Richardson, 418 U.S. 166, 190, 94 S.Ct. 2490, 41 L.Ed. 678 (1974)].

Contrary to other cases in which prudential restraint was necessary and in which standing was found lacking, this case demands judicial resolution. The suit arose from the Assessor denying an exemption to Petitioner and many others similarly situated. This suit for refund of taxes was instituted and the County (ne Assessor) defended its action by challenging the validity of §225. In the meantime, the State legislature exempted all inventory from taxation which had the effect of repealing §225 (Calif. stats. 1979 ch. 1150, §7). Caught in limbo, however, are the hundreds of lawsuits involving the denial of the exemption and the resultant taxation of property prior to this new enactment. The legislature cannot enact legislation to require the Assessor to refund the taxes because the California Courts have declared §225 unconstitutional and the California Constitution would prohibit such legislation as a gift of public funds (Article 16, §6). Thus, the matter must be resolved by the Court, no other governmental body has authority to do so.

D. SUMMARY

In all cases involving federal court jurisdiction, the threshhold question to be answered is

whether the injury or personal stake involved in the case is sufficient to guarantee that concrete adverseness necessary under the case or controversy requirements of Article III of the Constitution. A reviewing court must address this concern prior to discussing the merits of the case.

This appeal does not present a case or controversy issue under Article III. Nor is this case an appropriate one for the court to exercise its judicial restraint powers. It is a proper case to be decided on its merits.

The merits of this case requires an answer to the question: is §225 of the Revenue and Taxation Code unconstitutional? Resolution of this issue is necessary to preclude further litigation on this matter and to allow the state and county to begin application of the new law.

The issue raised by Petitioner is not truely a one of standing under Article III. It is an offshoot of this Court's judicial restraint policy. As pointed out supra, it is not only prudentially wise to allow a county to test the validity of a state statute, it is absolutely necessary under the current state of the law. Absent this ability, litigation will have a devastating effect on local governments.

Respondents urge this court to favorably resolve the "standing" issue and reach the merits of this appeal.

CONCLUSION

The California Court of Appeal, in following the decision in Zee Toys, Inc. v. County of Los Angeles, supra, 85 Cal.App.3d 763, correctly anticipated this Court's decision in Hughes v. Oklahoma, supra, 441 U.S. 322 and looked at the discrimination present in Section 225 as it affected interstate and foreign commerce. The holding that the granting of an exemption to foreign goods which is withheld from interstate goods violates the Commerce Clause is correct.

Respondents submit that for the reasons stated herein as well as in the companion case of Sears, Roebuck & Co. v. County of Los Angeles, October Term, 1978, No. 78-1577, the decision of the California Court of Appeal should be affirmed.

Respectfully submitted,

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